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No. 679

IN THE

Supreme Court of the United States

October Term, 1959

TRANS WORLD AIRLINES, INC.,

Petitioner,

v.

DELTA AIR LINES, INC., AMERICAN AIRLINES, INC., EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CIVIL AERONAUTICS BOARD, CITY OF NASHVILLE, TENNESSEE, and THE NASHVILLE CHAMBER OF COMMERCE, CITY OF TAMPA, FLORIDA, and THE GREATER TAMPA CHAMBER OF COMMERCE, CITY OF KANSAS CITY, MISSOURI, CITY OF ST. LOUIS, MISSOURI, and THE CHAMBER OF COMMERCE OF METROPOLITAN ST. LOUIS,

Respondents.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This reply is addressed to the Memorandum for the Civil Aeronautics Board (submitted jointly by the Department of Justice and counsel for the Board) and the briefs in opposition of American, Delta and National.

I.

The Conflict Between the Decision Below and the Second Circuit Decision in the *Eastern* Case

The decision below plainly conflicts with the Second Circuit decision in *Eastern Air Lines, Inc.* v. *Civil Aeronautics Board*, 271 F. 2d 752, petition for a writ of certiorari pending, case No. 785, this Term.

Both courts found that Eastern realized it had full opportunity throughout the proceeding to litigate the issue of mutual exclusivity.

In both cases, Eastern failed to submit any evidence on that issue at the hearing but tried to cure its default, after the decision, by a petition for reconsideration.

The Second Circuit held the issue was waived. The court below held the issue was not waived, and Eastern was entitled to findings on it. The Government agrees that "the decision of the Second Circuit on this matter is clearly correct" (Memorandum, p. 10).

American, Delta and National note that the point arose in different factual contexts. That is utterly immaterial. The important thing is that the two Courts reached diametrically opposite results, although Eastern's course of conduct was identical in the two cases.

The Government suggests that "if the decision here is deemed to rest on the notice point, there is no necessary conflict" between the two decisions (Memorandum, p. 9). The suggestion is untenable.

Both courts found—as the Government admits—that Eastern "was on notice of its rights to introduce evidence as to mutual exclusivity" (*ibid.*). How it got that notice was immaterial. *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572, 579. Notice is notice, however it comes. In such matters, "we are governed by the substance of things and not by mere form." *Simon* v. *Craft*, 182 U. S. 427, 436. The decisions are squarely in conflict.

II.

The Confusion Engendered by the Court's Erroneous Decision

The Government agrees that, on the other phase of the case—which concerns American, Delta and National—the decision below "was based on an erroneous reading of the record" (Memorandum, p. 8).

It suggests, however, that "the Board *may* well be able to avoid the impact of the case by specifying its practice with even greater particularity in future cases" (Memorandum, p. 9.)* Admittedly that is uncertain, for the Government says: "The scope of the decision below and of the grounds on which it rests is not altogether clear" (Memorandum, p. 1).

1. The decision would merit review even if, on this phase of the case, the court below had discussed nothing but the question whether American, Delta and National were on notice that they could litigate mutual exclusivity.

Civil Aeronautics Board v. *State Air Lines, Inc.*, 338 U. S. 572, involved almost wholly the question of adequacy of notice in an air route proceeding. Yet it was reviewed by this Court because the question was so important (p. 575).

2. But the court below discussed a host of other matters. Its decision contains flat pronouncements on several aspects of the Board's procedures. None was characterized by the court as unnecessary to its decision. No one knows what the case really means. The prospects for confusion are stupendous.

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* Emphasis is ours.

The decision below can be—and doubtless will be—seized on to support a number of positions, such as:

(a) The Board must make a finding of public convenience and necessity for each effective service made possible by the grant (App., pp. B8-B9, B-15).*

(b) The Board must follow *Delta* procedures on *Ashbacker* claims (App., p. B20).**

(c) Evidence on matters of defense raised after decision must be considered (App., p. B20).

At the agency level, the Government appears ready to resist such claims (Memorandum, pp. 4 fn., 8-9, 10). On review, it hopes to persuade the courts that only dicta in the opinion below support those claims. Yet admittedly even it is uncertain what the decision means and how far its troublesome implications go. It concedes, too, that if the "decision enunciates general rulings of law as to the implications of the *Ashbacker* rule" which "will require substantial and unwarranted alterations in the Board's procedure, review by this Court would be justified" (Memorandum, p. 2).

Unless the Court intervenes now, long litigation appears inevitable before meaningful answers are forthcoming. The opinion below will breed intolerable confusion in the myriad of complex route cases on which the Board must pass.

As the air transportation pattern is enlarged, the *Ashbacker* doctrine is being brought more and more into play.*** This Court should resolve now the confusion to

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* As the Government notes (Memorandum, p. 4), that conflicts with the "normal transportation rule" of "tacking."

** *Delta Air Lines, Inc.* v. *Civil Aeronautics Board*, 97 App. D. C. 46, 228 F. 2d 17; *Ashbacker Radio Corp.* v. *Federal Communications Comm.*, 326 U. S. 327.

*** Indeed, the decision below extended the *Ashbacker* doctrine to impact upon *existing* services.

which the erroneous decision below has added—even if only by way of what may (or may not) be dicta.*

III.

The Non-existent Independent Ground of Decision

Both American (Brief, p. 18) and Delta (Brief, pp. 13-14) purport to perceive in Part II of the decision below (App., pp. B15-B16)** an independent ground of decision not challenged by petitioner. The Government sees no such ground. Nor is there any. Part II of the opinion simply adopts the reasoning of Part I (App., p. B15):

> "We have said enough under I, *supra*, to show we agree with that argument."

But if such an independent ground were present, it would be directly challenged by No. 3 of the Questions Presented (Petition, p. 3) and by the notation of TWA's view that all necessary procedures were had with respect to impact on the interchange (Petition, p. 28).

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* In *Lawlor* v. *National Screen Service Corp.*, 352 U. S. 992, this Court granted certiorari even though the decision below was correct because the dicta of the Court of Appeals would embarrass future proceedings in that particular case. *A fortiori* certiorari should be granted where the decision below was erroneous and the supposed dicta of the Court of Appeals will embarrass future proceedings in cases affecting a whole industry.

** This relates to the Board's procedures to determine the impact on the existing interchange.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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REPLY OF DELTA AIR LINES, INC. TO REPLY OF EASTERN AIR LINES, INC. TO BRIEFS IN OPPOSITION TO PETITION FOR CERTIORARI

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April 27, 1960.

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INTRODUCTION

Delta Air Lines, Inc., (Delta) a Respondent herein, hereby replies, under Rule 24(4), to the Reply Brief of Petitioner Eastern Air Lines, Inc., (Eastern). Petitioner Trans World Air Lines, Inc., (TWA) also filed a Reply Brief but it raises no matters not already adequately covered in Delta's original Brief in Opposition.

I. EASTERN'S ASHBACKER CONTENTION

A. Eastern's Reply to the Question of Notice

At pages 3-5 of its Reply herein Eastern would have the Court believe there is no difference in the award to TWA of a transcontinental route and the certification of Delta between Memphis and Birmingham, and implies that Eastern therefore had no notice that Delta could be awarded the authority which was awarded. There are three answers to this contention, all or any one of which is fully dispositive of Eastern's argument.

In the first place, the award of a Kansas City-Memphis route to Eastern would *not* be the same route as the certification of Delta between Birmingham and Memphis. Delta commented on this aspect of Eastern's contentions at pages 20-21 of its Brief in Opposition wherein it pointed out that the Court below recognized Eastern's tactics of trying to break any route question into a multitude of segment possibilities, *ad infinitum*. No further reply to Eastern is needed in this regard.

Secondly, the possibility of provision of Kansas City-Memphis-Southeast service by Delta was in issue from the time of the Civil Aeronautics Board's (Board's) Consolidation Order,[1] so that Eastern did have notice from the outset. The Board pointed out that it would consider restrictions to prevent *Ashbacker* problems and in fact it *did* severely restrict Delta's authority for flights serving either St. Louis or Kansas City, on the one hand, and a Florida point on the other since it made mandatory a stop at Memphis *and* Birmingham *and* Atlanta. Furthermore, the matter of notice was not included in Eastern's Petition for Review in the Court below, and accordingly, Eastern is not in a position to raise it now.

Finally, Eastern did not timely file its Motion for Consolidation of its Memphis-Kansas City application.

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[1] Order No. E-10304 (J.A. 89).

Rule 12(b) of the Board's Rules of Practice in Economic Proceedings states:[2]

> "A motion to consolidate or contemporaneously consider an application with any other application shall be filed not later than the prehearing conference in the proceeding with which consolidation or contemporaneous consideration is requested, and shall relate only to a then pending application. * * *"

Under this Rule Eastern was required to request consolidation of its Memphis-Kansas City proposal in Docket No. 6834 at or before the date of the prehearing conference. The prehearing conference was held on March 22, 1956, and was attended by Eastern's counsel. Counsel did not move for consolidation of Eastern's Memphis-Kansas City application either before or at the prehearing conference. Neither did he so move in a subsequent 10-day period allowed by the Examiner for such motions. Eastern did not except to the fact that the Examiner's prehearing conference report did not show any such motion and it was not until June 16, 1956, that Eastern *first* mentioned its Memphis-Kansas City application, and then only in a Petition for Reconsideration of the Board's Consolidation Order. Since Eastern's request for consolidation was not timely filed, it has no standing in this Court to complain that its application was not consolidated.

B. Eastern's Reply as to Internal Conflict in the Decision of the Court Below

Again Eastern belabors the idea that it is entitled to every segment possibility of a route applied for by

[2] 14 CFR Sec. 302.12(b).

it considered on a segment by segment basis. But the Eastern request for a Kansas City-Memphis extension would provide infinite route possibilities to a large part of Eastern's existing system. This general flow-in of traffic at St. Louis is *all* available to support Eastern's Memphis-Kansas City proposed extension. The Board has found that the highly restricted certification of Delta between Memphis and Birmingham would not preclude such an award to Eastern.[3] Again the Court's attention is invited to pages 20-21 of Delta's Brief in Opposition.

C. Eastern's Reply Concerning Alleged Conflict Between Circuits

In the first place, Delta did *not* assert in its Brief in Opposition that the Court below found that Eastern had made a *prima facie* showing of exclusivity despite Eastern's contentions to the contrary in its Reply.[4] The Court below said that it did not know whether Eastern had made such a showing since the Board's opinion was not clear on the point. The Court pointed out that Eastern may not have made the required showing because of the backup traffic which it got from its existing routes in the Northeast through St. Louis.[5] This is an example of Eastern's attempt to mislead the Court.

Furthermore, as Delta pointed out at page 19 of its Brief in Opposition the procedural background of this

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[3] In this connection reference is made to Footnote 2 on page 5 of Eastern's Reply Brief. Delta knows of no Board pronouncement, either official or unofficial, that supports the proposition that provision of through-plane service shows effective route while lack of through-plane service shows lack of effective route. It is significant that Eastern cited no such authority.

[4] Eastern's Reply Brief, page 8.

[5] See discussion contained in Delta's Brief in Opposition, pp. 16-19, 21-22.

case and the Second Circuit Case of *Eastern Air Lines v. Civil Aeronautics Board*, 271 F. 2d 752 (1959), are not comparable. In the within case the Board made it clear that it was limiting the case to a St. Louis-Southeast area case. Eastern took no appeal from that consolidation order. On the other hand, Eastern *did* take an appeal[6] from the consolidation order in the Second Circuit case and was fully aware of the matters in issue. The procedural background of the two cases is not in the least comparable.

II. EASTERN'S REPLIES TO MISCELLANEOUS MATTERS

At page 15 of Eastern's Reply it suggests that because the Eastern-Braniff Airways, Inc., (Braniff) interchange between Kansas City and Atlanta could be duplicated by the certification of Delta between Memphis and Birmingham, the award to Delta was improper. Delta would point out to the Court that not only did Eastern never raise this question at any point in the proceeding prior to its Reply Brief herein but that Braniff, which purportedly would also be involved, has made no such claim on its own behalf. Furthermore, this is an additional example of Eastern's segmentation since the Eastern-Braniff interchange extends beyond Atlanta to a number of additional points in Florida, and beyond Kansas City to a number of points in the mid-West.

As a final matter at pages 16-18 of its Reply, Eastern suggests that recent legislation requested by the Board shows that the Board itself is in a quandary as to what to do about *Ashbacker* situations. Eastern, however,

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[6] *Eastern Air Lines v. Civil Aeronautics Board, et al.*, 100 App. D.. 184, 243 F. 2d 607 (1956). It should be noted that the Court therein did *not* say that *Ashbacker* did not apply in an area proceeding. The language of the Court is quoted at pages 15-16 of Delta's Brief in Opposition.

neglected to quote fully from the "Statement of Purpose and Need for Proposed Legislation" accompanying the draft bill. The material omitted by Eastern is most significant in determining the reason for the legislation and is as follows:

> "The Board recognizes that essential fairness sometimes requires contemporaneous consideration of applications and that consolidation for hearing is often the most expedient means for achieving this end. We have, however, taken the position that failure to consolidate applications for hearing does not in and of itself result in any deprivation of right, and that, in any event, legal error in consolidation, like any other that may be committed in the course of a particular case, is not judicially reviewable except as an incident to judicial review of the Board's final order entered at the conclusion of the proceeding."[7]

Eastern continued to quote from the Board's stated reasons for the legislation but omitted Items (2) and (3), which provide as follows:

> "* * * (2) provide that any judicial review of alleged errors in consolidation can be obtained only at the conclusion of a proceeding, (3) provide that the Board shall not be required to hold, prior to a hearing on the merits, a preliminary hearing on consolidation, and (4) * * *"[8]

It is perfectly clear that the reason for the Board's request for legislation is to ensure that consolidation orders are not considered final appealable orders. This rule was stated by the Court of Appeals for the District of Columbia in *Eastern Air Lines* v. *Civil Aeronautics*

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[7] 106 Cong. Rec. 6872 (daily ed. April 6, 1960).

[8] *Ibid.*

Board, et al., supra. Similarly, it is perfectly clear that Eastern is intentionally misconstruing the Board's legislative request and is a further example of Eastern's attempts to mislead this Court.

Various other arguments contained in Eastern's Reply have already been covered in Delta's Brief in Opposition and accordingly, will not be further discussed herein.

CONCLUSION

WHEREFORE, Delta respectfully prays that the Petitions for a Writ of Certiorari herein be denied.

Respectfully submitted,

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